

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 22, 2010

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: **MARTIN MARIETTA MATERIALS SOUTHWEST, INC.**  
**TCEQ DOCKET NO. 2010-1212-AIR**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

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**TCEQ DOCKET NO. 2010-1212-AIR**

<b>IN THE MATTER OF THE</b>	<b>§</b>	<b>BEFORE THE TEXAS COMMISSION</b>
<b>APPLICATION OF MARTIN</b>	<b>§</b>	
<b>MARIETTA MATERIALS</b>	<b>§</b>	<b>ON</b>
<b>SOUTHWEST, INC. FOR AIR</b>	<b>§</b>	
<b>QUALITY PERMIT NO. 82199L002</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUESTS**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Hearing Requests in the above-referenced matter.

**I. INTRODUCTION**

Martin Marietta Materials Southwest, Inc. has applied to the TCEQ for a New Source Review Authorization under the Texas Clean Air Act (TCAA) § 382.0518. This will authorize the construction of a new facility that may emit air contaminants.

This permit will authorize the applicant to construct a rock crushing plant consisting of one crusher, one screen, assorted conveyors, 20 acres of stockpiled aggregate, and one 475 hp Caterpillar Diesel engine. The plant will be authorized to operate 24 hours per day, 7 days per week, and 52 weeks per year for a total of 8,760 hours per year. The facility is located approximately ten miles north of Highway 90 on Farm-to-Market Road 462 (from Hondo) to Private Road 322, then west to Mine Lease Boundary, Hondo, Medina County. Contaminants authorized under this permit include 38.43 tons per year (tpy) of particulate matter (PM), including 16.14 tpy of particulate matter less than 10 microns in diameter (PM<sub>10</sub>), 0.92 tpy of organic compounds (VOC), 5.41 tpy of carbon monoxide (CO), 4.27 tpy of sulfur dioxides (SO<sub>2</sub>), and 31.19 tpy of nitrogen oxides (NO<sub>x</sub>).

Before work is begun on the construction of a new facility that may emit air contaminants, the person planning the construction must obtain a permit from the Commission. This permit application is for an initial issuance of Air Quality Permit Number 89957L001.

The Executive Director ("ED") received the application on July 30, 2009, and declared the application administratively complete on August 7, 2009. The Applicant published the Notice of Receipt of Application and Intent to Obtain an Air Quality Permit (NORI) on August 13, 2009, in the *Hondo Anvil Herald*. The notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published January 7, 2010 in the *Hondo Anvil Herald*.

The chief clerk mailed the Executive Director's Response to Comments (RTC) on April 30, 2010. The deadline for requesting a hearing was June 1, 2010. Timely-filed hearing requests were submitted by Kevin Long, Barbara Thompson, and Robert (Tony) Van Derbur. Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC finds that a reasonable relationship between the interests claimed in the hearing requests and the proposed regulated activity does not exist based on the distance between the requestors' residences and the proposed facility. OPIC therefore recommends that each of the requests be denied.

## II. APPLICABLE LAW

Because this application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health and Safety Code Section 382.056 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the

requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEXAS ADMIN. CODE (hereinafter "TAC") § 55.201(d) (2006). Hearing requests must be submitted to the Chief Clerk's Office in writing no later than 30 days after the Chief Clerk's transmittal of the Executive Director's Response to Comments. 30 TAC § 55.201(c).

Under 30 TAC section 55.203(a), an "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises

disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application.

30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

### III. DISCUSSION

#### A. No Requestor has Demonstrated Affected Person Status under the Commission Rules

Timely-filed hearing requests were submitted by Kevin Long, on behalf of Roy and Carol Long; Barbara Thompson; and Robert (Tony) Van Derbur.

The request submitted by Kevin Long, on behalf of Roy and Carol Long, raises concerns relating to possible negative impacts on drainage patterns, dust, noise, fire, and potential economic loss resulting from accidents incidental to operation of the proposed facility. The Longs state in their request that they reside less than "1/2 mile East of the proposed Martin Marietta railroad." Because the TCEQ does not permit mobile sources and does not have jurisdiction over railway operation or train traffic, the "regulated activity" that is the subject of this permit is confined to the proposed facility and does not extend to railways. The Information Resources Division of the TCEQ produced a map indicating the residence of the Longs is located

approximately 9.3 miles from the proposed facility. Although the Longs raise interests protected by the law under which the application will be considered,<sup>1</sup> the 9.3 mile distance between their residence and the proposed operation does not support a finding of a reasonable relationship between the interests claimed and the regulated activity.<sup>2</sup>

The request submitted by Barbara Thompson raises concerns relating to possible negative impacts on drainage patterns, dust, train safety, and fire. Ms. Thompson states in her request that she lives "within 300 yards of Martin Marietta's proposed railroad." Because the TCEQ does not permit mobile sources and does not have jurisdiction over railway operation or train traffic, the "regulated activity" that is the subject of this permit is confined to the proposed facility and does not extend to the railways. The Information Resources Division of the TCEQ produced a map indicating the residence of Ms. Thompson lies approximately 5.7 miles from the proposed facility. The distance between her residence and the proposed operation does not support a finding of a reasonable relationship between the interests claimed and the proposed regulated activity.<sup>3</sup>

The request submitted by Robert (Tony) Van Derbur raises concerns relating to incomplete, unavailable, or inadequate safety measures; dust; potential negative impacts on wildlife and livestock; impact on drainage patterns; impacts on water sources; impacts on endangered species; increased truck traffic; and incomplete, unavailable, or inadequate environmental impact modeling. Mr. Van Derbur states in his request that he owns a business in Hondo located 7 miles from the quarry which will be within a city block of "of any truck traffic moving quarried materials from the plant," as well as a home adjacent to "the main rail line

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<sup>1</sup> 30 TAC § 55.203(c)(1).

<sup>2</sup> 30 TAC § 55.203(c)(3).

<sup>3</sup> 30 TAC § 55.203(c)(3).

leading to San Antonio [which] points East where Median Rock plans to ship [quarried materials]." Because the TCEQ does not permit mobile sources and does not have jurisdiction over railway operation, train or truck traffic, the "regulated activity" that is the subject of this permit is confined to the proposed facility and does not extend to the railways or public roads. The Information Resources Division of the TCEQ produced a map indicating the residence of Mr. Van Derber lies approximately 14.8 miles from the proposed facility. Although Mr. Van Derber raises concerns that are protected by the law under which the application will be considered, the relative distance between the proposed plant and his home or business does not support a finding of a reasonable relationship between the interests claimed and the proposed regulated activity.<sup>4</sup>

A. Referable Issues

Should the Commission disagree with OPIC's determination that no requestor has demonstrated affected person status, OPIC would recommend that the following relevant and material issues be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

- (1) Will the proposed operation result in nuisance conditions, including noise and dust?
- (2) Will the permitted emissions negatively impact ambient air quality where the requestors live?
- (3) Can the proposed facility be safely operated?
- (4) Will the proposed facility negatively impact wildlife, including endangered species?
- (5) Were facility operations and potential environmental impacts properly modeled?

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<sup>4</sup> 30 TAC §55.203(c)(3).

**B. OPIC Estimates that the Maximum Expected Duration of Hearing will be Nine Months.**

Commission rule 30 TAC section 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of any hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

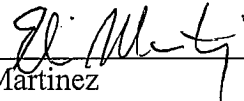
**IV. CONCLUSION**

For the reasons set forth above, and based on the distance between the requestors' residences and the proposed facility, the Office of Public Interest Counsel finds that a reasonable relationship between the interests claimed in the hearing requests and the proposed regulated activity does not exist. OPIC therefore recommends denying the contested case hearing requests of each requestor. Should the commission disagree, OPIC would recommend referring the issues set forth in Section III.A outline above to SOAH for a contested case hearing. OPIC would further recommend a hearing duration of nine months.



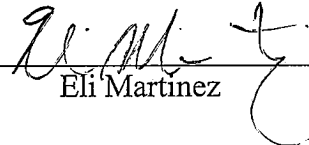
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2010, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Hearing Requests were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
Eli Martinez

**MAILING LIST**  
**MARTIN MARIETTA MATERIALS SOUTHWEST, INC.**  
**TCEQ DOCKET NO. 2010-1212-AIR**

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